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Supreme Court of the United States

OCTOBER TERM, 1997

DELORES FRAHM, ROYCE TERRY, GERALD COLSON, LAURENCE WILNEFF AND CLAIRE GOLDBERG, ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED,

Petitioners,

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

In *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996), this Court held that a plan fiduciary violates a duty of loyalty under section 404(a) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1104(a), when it "participate[s] knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense." Based on *Varity Corp.*, the circuits now agree that, at a minimum, under ERISA's duty of loyalty plan fiduciaries may not lie deliberately to beneficiaries and participants about their benefits. It is upon this baseline consensus that respondent, The Equitable Life Assurance Society of the United States ("Equitable"), rests its claim that the circuits now speak in one voice. But Equitable does not address the question left open by this Court in *Varity Corp.*, which now divides the courts and is presented by this petition: "whether ERISA fiduciaries have any fiduciary duty to disclose truthful information on their own initiative, or in response to employee inquires" under ERISA § 404(a)(1) (codified at 29 U.S.C. § 1104(a)(1)). *Varity Corp.*, 516 U.S. at 506.

This petition requests certiorari to resolve a circuit conflict over whether fiduciaries have a duty to disclose complete and accurate plan information in response to injuries by beneficiaries or participants under either section 404(a)(1)(A) or (B) of ERISA. Because the nation's ERISA plans should not be governed by a patchwork of legal duties varying from circuit to circuit, and because the ERISA duty to disclose should be enforced fully by all our courts, petitioners request that writ of certiorari be granted.

REASONS FOR GRANTING THE WRIT

A. THE PARTIES AGREE THAT ERISA PROVIDES A DUTY TO DISCLOSE COMPLETE AND ACCURATE PLAN INFORMATION

The parties agree on the basic principles underlying this case. Equitable does not contest that under conventional trust law standards (which undergird ERISA, *Varity Corp.*, 516 U.S. at 496), a fiduciary must furnish complete and accurate information about a trust upon inquiry by a beneficiary. (Pet. at 12-14.) *See* Restatement (Second) of Trusts § 173 ("[t]he trustee is under a duty to the beneficiary to give him upon his request at reasonable times complete and accurate information as to the nature and amount of the trust property . . . ."). Equitable even supplements petitioners' authority with its own citation (Resp. at 9) to Restatement (Second) of Trusts § 201, comment a, which confirms that a trustee should not be negligent in dealings with beneficiaries (a "trustee does not commit a breach of trust if he does not intentionally *or negligently* do what he ought not to do or fail to do what he ought to do") (emphasis added), and Equitable agrees at a minimum that *gross* negligence by a fiduciary in providing information would be actionable. (Resp. at 11.)[1] Nor does Equitable contest petitioners' premise that ERISA §404(a) incorporates the fiduciary duty to convey

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[1] While petitioners do not necessarily advocate that a negligence standard apply to review of fiduciary misstatements under section 404(a)(1) of ERISA, because a different standard of fault might be appropriate, we note that Equitable echoes our position *sotto voce* that the Seventh Circuit's interpretation of this section of ERISA—requiring deliberate misconduct by a fiduciary—imposes too low a burden on plan fiduciaries.

complete and accurate information about benefits. (Pet. at 12-15.)

What, then, divides the parties on this petition? Equitable argues first (at 4-8) that under the facts of this case, its employees received sufficiently complete and accurate information about the projected future of their health benefits. But the Seventh Circuit's decision precludes this line of argument. Reviewing the record below, the court of appeals found that Equitable's descriptions of the retiree's health benefits were "potentially misleading to someone who had a decision to make" and "did not (and could not) provide complete information about what would happen to benefits some years hence" (App. 8.) Equitable's analysis disregards this part of the Seventh Circuit's decision. It was *in spite* of these findings that the Seventh Circuit affirmed a judgment in respondent's favor. It did so by holding outright that a fiduciary who makes incorrect representations about the future of the health benefits to its employees would not be held liable unless the statements constituted, as the Seventh Circuit interpreted *Varity Corp.*, a "campaign of disinformation that led employees to surrender their benefits." (App. 6.) Excepting such deliberate misconduct, then, the Seventh Circuit holds that simple "[n]egligence—a violation of the duty of care—is not actionable." (App. 7.)

Equitable has also stressed that the district court found that Equitable satisfied its duty to provide complete and accurate information by "adequately train[ing] its benefits staff to give correct advice." (Resp. at 5.) But in view of the Seventh Circuit's holding that only deliberate misconduct is actionable under ERISA, the degree of care in training managers becomes less

meaningful. Under the *Frahm* rule, followed strictly, even the missteps of a poorly-trained staff would not necessarily trigger liability unless (for instance) the mistraining itself was a knowing act. As we note below, this stance is quite at odds with other circuits.

B. RESPONDENT UNDERSTATES THE DISCORD AMONG THE CIRCUITS

Petitioners have already chronicled (Pet. at 9-12) the split in the courts of appeals over the scope of the fiduciary duty to disclose complete and accurate information about benefits. Equitable papers over the difference between the cases (Resp. at 10-15) by arguing that the courts agree on a baseline duty of disclosure under ERISA, described variously as a duty not to engage in "a widespread campaign to *mislead*" participants (Resp. at 11), to refrain from "*affirmative* misrepresentations" (*id.* at 13), or to avoid "*affirmatively providing* misleading or inaccurate information" (*id.* at 14) (emphasis added). But Equitable—like the Seventh,[2] Fourth and Sixth

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[2] Equitable cites (at 7 n. 1) two other Seventh Circuit decisions, neither of which are controlling because of their distinctive factual settings. In *Schmidt v. Sheet Metal Workers' National Pension Fund,* 128 F.3d 541, 547 (7th Cir. 1997), the asserted misleading statement did not originate with a plan fiduciary, so the issue was not joined. Meanwhile, in *Anweiler v. American Electric Power Service Corp.*, 3 F.3d 986, 992 (7th Cir. 1993), the plan fiduciary violated its duty of loyalty by getting the participant to sign a reimbursement agreement that reduced the amount of his disability income, without explaining the effect of the agreement on his benefits, thereby "manipulat[ing] its position as insurer of the disability plan and life insurance policy to its own benefit rather than Mr. Anweiler's. . . ."

Circuits—would draw the line of ERISA liability at preventing *only* such deliberate misconduct, while finding no liability for other kinds of untruthful statements by fiduciaries. The Seventh Circuit held the duty in *Varity Corp.* extended only to such a case involving a "campaign of disinformation that led employees to surrender their benefits," while for other kinds of misstatements, no liability attached. (App. 7.) *See also Sprague v. General Motors Corp.*, 133 F.3d 388, 405 (6th Cir.) (*en banc*) (fiduciary duty delineated in *Varity Corp.* extended only to prohibit "deliberate misleading of employees"), *cert. denied*, 118 S. Ct. 2312 (1998); *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 657 (4th Cir. 1996) (except for prohibiting schemes to "mislead participants or beneficiaries," ERISA recognizes no "general fiduciary obligation under ERISA to provide information related to the plan on request"), *cert. denied*, 117 S. Ct. 738 (1997).

In contrast to these three courts, the majority of circuits find liability where there is untruthful, albeit not fraudulent, disclosure. (Pet. at 9-11.) To illustrate this point, let us pose this counterfactual inquiry: Could the plaintiffs from the majority-rule cases survive under the *Frahm* standard—that is, did those plaintiffs establish that the plan fiduciaries "bilk[ed] employees into surrendering their [benefits]" (App. 6)? We shall review a few key cases:

- In *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, 57 F.3d 1255 (3d Cir. 1995), *cert. denied*, 517 U.S. 1103 (1996), as in this case, the medical benefit plan expressly reserved the employer's right to terminate the plan "at any time," but the company informed employees that upon retire-

ment medical benefits would "be continued for the rest of your life." The Third Circuit affirmed a ruling that the company violated its duty by "misinform[ing] its employees about the duration of their benefits by stating over and over again, without qualification, that their benefits would continue for life." *Id.* at 1266. Equitable points to no material, factual difference between the *Unisys* case and the present one, yet the outcomes were polar opposites.

- In *Estate of Becker v. Eastman Kodak Co.*, 120 F.3d 5 (2d Cir. 1997) the employer neglected to inform an employee (Mrs. Becker) that her family would forfeit her pension benefits if she died before she retired. Because she was unaware of this fact, Becker (who by this time knew she was terminally ill) did not take other plan options available to her to safeguard her benefits. The Second Circuit found liability even in the absence of evidence that the company knew about the effect that its non-disclosure would have on Becker's family. In the absence of fraud or deliberate misconduct, Becker's family would have lost in the Seventh Circuit.

- In *Shea v. Esensten*, 107 F.3d 625, 628-29 (8th Cir.), *cert. denied*, 118 S. Ct. 738 (1997), the fiduciaries failed to disclose, under an HMO policy, that doctors had financial incentive not to make referrals to specialists. Again, in contrast to the Seventh Circuit, the Eighth Circuit imposed no requirement that the failure to disclose this information be deliberate, only that it be material.

- Finally, in a case decided since this petition was filed, *Farr v. U.S. West Communications, Inc.*, No. 96-36051, 1998 WL 310102 (9th Cir. June 15, 1998), the employer developed an early retirement plan, the "5 + 5 Program," which allowed employees to receive their accrued pension benefits in a lump sum. Along with a summary of the details of the plan, the employer published advice about the tax consequences of accepting the benefits. The published advice failed to mention a hitch in the tax law: that amounts exceeding the qualified portion of the lump sum eligible for tax-deferred treatment would be taxed immediately. The company included a disclaimer (in its summary plan description) that because tax options were "very complex" employees should consult a tax advisor. Despite the reservation, the Ninth Circuit reversed summary judgment for U.S. West and held as a matter of law that its actions breached a fiduciary duty to provide "*thorough and accurate* information explaining the 5 + 5 retirement option that it offered to entice employees to retire." *Id.* at *6 (emphasis added). In the Seventh Circuit, the absence of a deliberate campaign to mislead employees would have defeated this claim.

Thus, while the Seventh Circuit under *Frahm* (as well as the Fourth and Sixth Circuits, see Pet. at 11-12) requires lying, bilking or self-dealing by the fiduciary to state a claim, none of the circuits noted above (or in our petition) so required. The Seventh Circuit elided this conflict by citing none of these majority-rule cases on this issue—even in an attempt to distinguish them—

while instead citing the harmonious Sixth Circuit decision in *Sprague*. (App. 6.)[3]

Equitable repeatedly caricatures (Resp. at 9, 11 and 13) the ERISA duty to disclose complete and accurate information as a form of "absolute" or "strict" liability on fiduciaries for errors. (The same characterization appears in the court of appeals decision. App. 9.) Again, reviewing the case law from the majority of circuits, this is not the standard that petitioners seek or that imposed by the majority of courts. A beneficiary or participant would still have to prove (as they do in every circuit) at least that they suffered a harm caused by a fiduciary's nonfeasance, that the misstatement or omission was material to the beneficiary or participant and that ERISA provides a remedy. In addition, the trust law duty of care evinces a standard of reasonableness, which would go a long way to ease the burden postulated by the Seventh Circuit to avoid trivial or accidental misstatements.

But ours is not a case of a misplaced decimal point, or an unforecast financial catastrophe that levels a fund. It is an admitted case of numerous managers, even the president himself, promising health benefits without charge to employees—while apparently knowing (or fail-

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[3] Equitable also misapprehends (Resp. at 8-9) petitioners' argument that a fiduciary duty to convey complete and accurate information about plan benefits is a necessary complement to the duty to provide written plans and plan summaries (Pet. at 15). Participants and beneficiaries need to be able to trust fiduciaries to provide truthful answers to questions posed by plan documents, and an untruthful answer (even honestly given) can rob someone entirely of their benefits, such as in the majority-rule cases cited above.

ing to inform themselves) that the plan allowed the company to line out those benefits at any time. Telling the truth in this case did not require "prevision," as the Seventh Circuit put it (App. 8), but simply telling employees (consistent with the summary plan description) that retiree benefits could be changed or eliminated at management's discretion. The bottom line question presented by these cases is who bears the cost when the plan fiduciary (like the trustee at common law), charged with keeping the beneficiaries and participants informed, speaks untruthfully? It is a question worthy of this Court's review.[4]

Commentators concur that courts are divided on this important issue. *See, e.g.*, Wilber H. Boies, *New Focus for Erisa Litigation: Communicating with Employees about Benefits*, Practicing Law Institute, 26th Annual Institute on Employment Law at 683-704 (Sept. 1997) (outlining the cases and observing that, on this issue, "the law varies among the circuits"); Robert N. Eccles, *Fiduciary Litigation Under ERISA*, in *Pension Plan Investments: Confronting Today's Issues*, Practicing Law Institute, Tax Law and Practice at 32 (May 1998) (observing that a "growing amount of litigation alleging section 404(a)(1)(A) violations has focused on allegations that participants were promised a benefit which is not, in fact, provided under the express terms of the plan,"

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[4] Equitable regards it "worth noting" the Court's recent denial of certiorari in *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir.) (*en banc*), *cert. denied*, 118 S. Ct. 2312 (1998), which also presented a fiduciary duty claim. (Resp. at 16.) Yet the petitioners in *Sprague* did not raise the fiduciary duty issue in their questions presented to this Court (see 66 U.S.L.W. 3709 (1998)), while petitioners make this the sole focus of their case.

and noting split among the courts on this issue); Dana M. Muir, *Truth or Consequences:* Varity v. Howe *and Beyond*, 13 Lab. Law. 411, 422 (1998) (while the circuits "agree that a fiduciary's affirmative material misrepresentations" may constitute a breach of fiduciary duty, they disagree on the scope of the duty beyond that point). (These articles all appear in Westlaw's TP-ALL file.)

It is not possible to accept Equitable's sanguine view of the state of the law. The split of authority is both genuine and yawning. Only this Court can bring order to the chaos.

CONCLUSION

Petitioners pray that the petition for writ of certiorari be granted.

Respectfully submitted,

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